



STATE OF WISCONSIN Division of Hearings and Appeals

In the Matter of

Office of the Inspector General, Petitioner

vs.

██████████, Respondent

DECISION

Case #: FOF - 170638

Pursuant to petition filed December 7, 2015, under Wis. Admin. Code §HA 3.03, and 7 C.F.R. § 273.16, to review a decision by the Office of the Inspector General to disqualify ██████████ ██████████ from receiving FoodShare benefits (FS) one year, a hearing was held on Tuesday, January 19, 2016 at 09:15 AM via telephone. The petitioner appeared from Madison, Wisconsin. DHA attempted to contact the respondent at the last-known telephone number at 9:20 a.m. and received a message that the number was not accepting calls. No other telephone number was known to DHA or the OIG and the respondent did not contact DHA prior to the hearing to provide a telephone number. The OIG noted that it last had contact with the respondent in November, 2015 and the respondent declined to provide current contact information to the OIG. The hearing notice and the hearing exhibits were sent to the respondent's last known address and all were returned to the agency with no forwarding address.

The issue for determination is whether the respondent committed an Intentional Program Violation (IPV).

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

Office of the Inspector General
Department of Health Services - OIG
PO Box 309
Madison, WI 53701

Respondent:

██████████
██████████
██████████

█

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. The respondent (CARES # [REDACTED]) is a resident of Winnebago County who received FS benefits in Winnebago County from November 20, 2013 through August 31, 2014.
2. In July, 2013, the respondent's daughter moved to [REDACTED] to reside with her father. Respondent's daughter received Medical Assistance benefits from the State of [REDACTED] beginning December 5, 2013. She enrolled in school in [REDACTED] in August, 2013.
3. On September 6, 2013, the respondent was charged with one felony count of Possession with Intent – THC in Winnebago County Circuit Court [REDACTED].
4. On November 20, 2013, the respondent submitted a FS application. She is alleged to have reported that she had a drug felony. The agency determined the charges against the respondent were still pending. FS benefits were approved for the respondent.
5. On December 5, 2013, the respondent entered a no contest plea and was found guilty of a felony count of Possession with Intent – THC in [REDACTED].
6. On May 8, 2014, the respondent submitted a renewal FS application. She reported her daughter in her household. She is alleged to have reported that she did not have a drug felony conviction. She was approved for FS benefits for herself and her daughter.
7. On July 31, 2014, the OIG had contact with the respondent who conceded her daughter had not been living with her for approximately one year.
8. On December 14, 2015, the petitioner prepared an Administrative Disqualification Hearing Notice alleging that respondent provided false information to obtain FS benefits. Specifically, the agency alleges the respondent intentionally failed to report her drug felony and intentionally misrepresented her daughter's residence in the household.
9. The respondent failed to appear for the scheduled January 19, 2016 Intentional Program Violation (IPV) hearing and did not provide any good cause for said failure to appear.

DISCUSSION

An intentional program violation of the FoodShare program occurs when a recipient intentionally does the following:

1. makes a false or misleading statement, or misrepresents, conceals or withholds facts;
or
2. commits any act that constitutes a violation of the Food Stamp Act, the Food Stamp Program Regulations, or any Wisconsin statute for the purpose of using, presenting, transferring, acquiring, receiving, possessing or trafficking of FoodShare benefits or QUEST cards.

FoodShare Wisconsin Handbook, § 3.14.1; *see also* 7 C.F.R. § 273.16(c) and Wis. Stat. §§ 946.92(2).

An intentional program violation can be proven by a court order, a diversion agreement entered into with the local district attorney, a waiver of a right to a hearing, or an administrative disqualification hearing, *FoodShare Wisconsin Handbook*, § 3.14.1. The petitioner can disqualify only the individual found to have committed the intentional violation; it cannot disqualify the entire household. Those disqualified on grounds involving the

improper transfer of FS benefits are ineligible to participate in the FoodShare program for one year for the first violation, two years for the second violation, and permanently for the third violation. Although other family members cannot be disqualified, their monthly allotments will be reduced unless they agree to make restitution within 30 days of the date that the FS program mails a written demand letter. 7 C.F.R. § 273.16(b).

7 C.F.R. §273.16(e)(4) provides that the hearing shall proceed if the respondent cannot be located or fails to appear without good cause. The respondent did not appear or claim a good cause reason for not attending the hearing. Therefore, I must determine whether the respondent committed an IPV based solely on the evidence that the petitioner presented at hearing.

In order for the petitioner to establish that an FS recipient has committed an IPV, it has the burden to prove two separate elements by clear and convincing evidence. The recipient must have: 1) committed; and 2) intended to commit a program violation per 7 C.F.R. § 273.16(e)(6). In *Kuehn v. Kuehn*, 11 Wis.2d 15 (1959), the court held that:

Defined in terms of quantity of proof, reasonable certitude or reasonable certainty in ordinary civil cases may be attained by or be based on a mere or fair preponderance of the evidence. Such certainty need not necessarily exclude the probability that the contrary conclusion may be true. In fraud cases it has been stated the preponderance of the evidence should be clear and satisfactory to indicate or sustain a greater degree of certitude. Such degree of certitude has also been defined as being produced by clear, satisfactory, and convincing evidence. Such evidence, however, need not eliminate a reasonable doubt that the alternative or opposite conclusion may be true. ...

Kuehn, 11 Wis.2d at 26.

Wisconsin Jury Instruction – Civil 205 is also instructive. It provides:

Clear, satisfactory and convincing evidence is evidence which when weighed against that opposed to it clearly has more convincing power. It is evidence which satisfies and convinces you that “yes” should be the answer because of its greater weight and clear convincing power. “Reasonable certainty” means that you are persuaded based upon a rational consideration of the evidence. Absolute certainty is not required, but a guess is not enough to meet the burden of proof. This burden of proof is known as the “middle burden.” The evidence required to meet this burden of proof must be more convincing than merely the greater weight of the credible evidence but may be less than beyond a reasonable doubt.

Further, the *McCormick* treatise states that “it has been persuasively suggested that [the clear and convincing evidence standard of proof] could be more simply and intelligibly translated to the jury if they were instructed that they must be persuaded that the truth of the contention is highly probable.” 2 *McCormick on Evidence* § 340 (John W. Strong gen. ed., 4th ed. 1992).

Thus, in order to find that an IPV was committed, the trier of fact must derive from the evidence a firm conviction as to the existence of each of the two elements even though there may be a reasonable doubt as to their existence.

In order to prove the second element, i.e., intention, there must be clear and convincing evidence that the FS recipient intended to commit the IPV. The question of intent is generally one to be determined by the trier of fact. *State v. Lossman*, 118 Wis.2d 526 (1984). There is a general rule that a person is presumed to know and intend the probable and natural consequences of his or her own voluntary words or acts. See, *John F. Jelke Co. v. Beck*, 208 Wis. 650 (1932); 31A C.J.S. Evidence §131. Intention is a subjective state of mind to be determined upon all the facts. *Lecus v. American Mut. Ins. Co. of Boston*, 81 Wis.2d 183 (1977). Thus, there must be clear and convincing evidence that the FS recipient knew that the act or omission was a violation of the FS Program but committed the violation anyway.

The evidence in this case is less than compelling with regard to the allegation that the respondent failed to report her drug conviction. The agency did not provide a copy of the November 20, 2013 application of the respondent and the May 8, 2014 application that was submitted as evidence contained only pages 1, 3 and 5. The agency testified that the respondent reported “No” on the May 8, 2014 application when asked if she had a drug conviction but the documentation is insufficient to support the agency’s testimony. The evidence does establish that the respondent was convicted of a drug felony in December, 2013. She continued to receive FS benefits subsequent to the conviction. Though the evidence regarding the failure to report a drug conviction might meet a preponderance standard, based on the evidence presented, I cannot conclude that the OIG has met the clear and convincing standard that is required to prove an intentional program violation.

With regard to the allegation that the respondent intentionally reported her daughter was in the household in order to receive FS benefits for her, I conclude the OIG has established by clear and convincing evidence that the respondent intentionally violated FS program rules. Though the November 20, 2013 application was not submitted as evidence, the FS issuance history and the May 8, 2014 application establish that the respondent continued to report her daughter in the household and she continued to receive FS benefits for her daughter when her daughter was living in [REDACTED] with her father. The case comments indicate that respondent conceded her daughter had been out of the house since approximately July, 2013. This corresponds with information the OIG obtained about the daughter’s enrollment in school in [REDACTED] and the daughter’s receipt of public assistance in [REDACTED]. I conclude that the respondent violated FS program rules when she reported her daughter in her household and that she clearly intended to violate the rules by reporting false information. This violation is the first such violation committed by the respondent. Therefore, the petitioner correctly seeks to disqualify the respondent from the FS program for one year.

CONCLUSIONS OF LAW

1. The respondent violated, and intended to violate, the FS program rule specifying that FS applicants and recipients must provide truthful and accurate information.
2. The violation specified in Conclusion of Law No. 1 is the first such violation committed by the respondent.

NOW, THEREFORE, it is

ORDERED

That the petitioner’s determination is sustained, and that the petitioner may make a finding that the respondent committed a first IPV of the FoodShare program and disqualify the respondent from the program for one year, effective the first month following the date of receipt of this decision.

REQUEST FOR A REHEARING ON GROUNDS OF GOOD CAUSE FOR FAILURE TO APPEAR

In instances where the good cause for failure to appear is based upon a showing of non-receipt of the hearing notice, the respondent has 30 days after the date of the written notice of the hearing decision to claim good cause for failure to appear. See 7 C.F.R. sec. 273.16(e)(4). Such a claim should be made in writing to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

APPEAL TO COURT

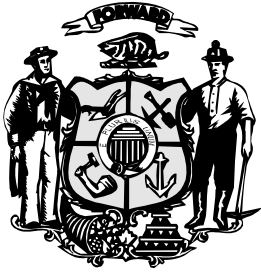
You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, WI 53703, **and** on those identified in this decision as “PARTIES IN INTEREST” **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing request (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Milwaukee,
Wisconsin, this 29th day of February, 2016

\sDebra Bursinger
Administrative Law Judge
Division of Hearings and Appeals

c: Office of the Inspector General - email
Public Assistance Collection Unit - email
Division of Health Care Access and Accountability - email
Leslie Vosters - email



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on February 29, 2016.

Office of the Inspector General
Public Assistance Collection Unit
Division of Health Care Access and Accountability
leslie.vosters@wisconsin.gov